

**IN THE COURT OF APPEALS OF IOWA**

No. 0-591 / 10-0340  
Filed September 9, 2010

**GARY R. TUNINK JR., Individually,  
TASHA and TYLER TUNINK, Individually  
and TOM HAMILTON, as Special  
Administrator of the Estate of  
Jodi E. Munn, Deceased,**  
Plaintiffs-Appellants,

**vs.**

**CONTINENTAL WESTERN  
INSURANCE COMPANY,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for O'Brien County, Nancy L.  
Whittenburg, Judge.

The plaintiffs appeal from the district court's grant of summary judgment to  
the defendant insurer in an insurance coverage dispute. **AFFIRMED.**

Mary C. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellant.

Rene Charles LaPierre of Klass Law Firm, L.L.P., Sioux City, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

**MANSFIELD, J.**

Early on December 4, 2004, David Johannsen, chief of police for the City of Sutherland, was the driver of a vehicle involved in a rollover accident that resulted in the death of Jodi Munn and severe injuries to Gary Tunink. This is the second time the facts of this case have been before us. In a prior opinion, we held the City was not vicariously liable for Munn's death and Tunink's injuries because Johannsen was acting outside the scope of his employment at the time of the accident. We set forth the facts as follows:

The City of Sutherland employs a chief of police and one reserve officer. When each is "on duty" is determined by a monthly schedule. When not "on duty," these positions are considered to be "on call," meaning the chief of police is "on call" twenty-four hours per day.

On the night of December 3, 2004, Johannsen was "on call" watching television at home. Because it was the night before the deer-hunting season began, known as "strategy night" in Sutherland, Johannsen was aware there would be an influx of people from outside Sutherland and that alcohol would be consumed.

Sometime between 10:30 and 11:00 p.m. that night, Johannsen began patrolling Sutherland in his patrol car and in uniform. At approximately midnight, Johannsen entered the Main Street Lounge where he socialized for between ten and thirty minutes. Johannsen's best friend, Gary (Bud) Tunink, Jr. was there along with Tunink's girlfriend, Jodi Munn.

After leaving the lounge, Johannsen continued his patrol and stopped at Bedsaul's Bar at approximately 1:00 a.m. He left approximately thirty minutes later and again resumed his patrol. Just before 2:00 a.m., Johannsen noticed a crowd gathering in front of Bedsaul's Bar. He saw Tunink and several men having an argument, and Tunink struck one of the men. Johannsen moved Tunink away from the men and Tunink left with Munn. Johannsen asked the man struck by Tunink to sit in his patrol car, where Johannsen gave him his business card and told him to call in the morning if he wanted to file charges against Tunink.

Johannsen continued his patrol until approximately 2:30 a.m., when he saw his niece, Amber Carlson, walking home. He stopped and offered to give her a ride. Before he reached Carlson's home, Johannsen received a call from Munn on his

personal cell phone. She told him Tunink was talking about returning downtown to find the men from the earlier confrontation. Johannsen then drove directly to Tunink and Munn's residence where he convinced Tunink not to go downtown. He assured Tunink he would return after dropping Carlson off at home. Johannsen then drove downtown, found the men in question, and instructed them to go home. Johannsen then dropped Carlson off at approximately 2:45 a.m.

Johannsen was again heading through downtown when he saw Erica Wheeler in her car. Wheeler was a friend of both Tunink and Johannsen and knew about the fight that had occurred earlier. She told Johannsen she wanted to visit with Tunink at his home. Johannsen told her he was heading home but then would pick her up at her house before heading to Tunink and Munn's home.

When Johannsen arrived home, he took off his uniform jacket and Kevlar vest, and put on his University of Iowa Hawkeye coat. He left his duty belt and gun in the house, got in his personal pickup truck, and drove to Wheeler's home. During the drive, Johannsen spoke with Tunink on his personal cell phone. Johannsen and Wheeler arrived at Tunink and Munn's residence at approximately 3:00 a.m. The group decided to go for a drive, with Johannsen driving his truck, Wheeler in the passenger seat, and Tunink and Munn sharing the back seat. The group had beer in the vehicle.

Johannsen drove through town. As they left town, Tunink and Munn began having sex in the back seat of the truck. Johannsen continued driving three miles north of Sutherland and turned on to a gravel road. He drove about another mile before stopping so that Wheeler could relieve herself. Johannsen then continued driving, playing music loudly as Tunink and Munn continued having sex. However, Johannsen became distracted by Tunink and Munn's activity and turned slightly to see what was going on. As he did so, the truck crossed the center line and when Johannsen attempted to correct his course of travel, he lost control of the vehicle. The truck went into the ditch and rolled several times before coming to rest in a field. Johannsen and Wheeler were both wearing their seatbelts at the time of the crash and survived. However, Tunink and Munn were thrown from the vehicle.

Johannsen attempted to use his cell phone to call emergency services but could not get a signal. He ran approximately two hundred yards up a hill and eventually was able to make a call. He began to descend the hill when he realized he was wearing the mock-turtleneck shirt with the letters "SPD" embroidered on the collar. Because he did not want to be associated with his position as police chief, Johannsen discarded his shirt into a culvert.

Johannsen administered CPR to Munn until emergency services arrived. She later died at the hospital as a result of her injuries. Tunink's injuries resulted in permanent paralysis.

Johannsen was transported to the hospital where he discussed the evening's events with a state patrol officer. A preliminary breath test was administered and Johannsen registered a blood alcohol level of .000. Johannsen was released from the hospital and returned to the scene of the accident. He later returned on two occasions with his brother-in-law, but upon finding the investigation was ongoing each time, left without stopping. On a third visit to the scene, the investigation had concluded and Johannsen retrieved his shirt from the culvert. Johannsen later admitted discarding and retrieving his turtleneck shirt.

On May 9, 2005, Tunink filed a petition on behalf of himself and as the parent of his minor children. Johannsen and the City were named as defendants. He alleged Johannsen's negligence caused him to suffer serious and permanent injuries, and deprived his daughters of his companionship, affection, and support. He alleged Johannsen was acting in the scope of his employment, and therefore the City was liable for his damages.

On September 6, 2005, Tom Hamilton, as Special Administrator of the Estate of Jodi Munn, filed a petition naming Johannsen, his wife, and the City as defendants. The petition alleged Johannsen negligently operated his vehicle while acting within the scope of his employment with the City, and proximately caused Munn's death.

On October 14, 2005, the City filed a motion to consolidate the actions, which was granted on December 5, 2005. On February 2, 2006, the City filed a motion for summary judgment, arguing it was not liable because Johannsen was not acting in a manner consistent with his duties and obligations as chief of police at the time the accident occurred. Following a hearing, the district court entered its May 18, 2006 order granting summary judgment in favor of the City and dismissing it as a defendant.

*See Hamilton v. Johannsen*, No. 06-0978, 2007 WL 1203009 (Iowa Ct. App. Apr. 25, 2007). In granting summary judgment to the City, the district court had held:

The court finds no basis . . . for concluding that a reasonable jury would find that Johannsen, acting as Chief of Police, would conduct a "cool down" ride using his personal vehicle outside of the city limits. Nor would there be a reasonable basis for the jury to find that the City would expect the Chief of Police to include Wheeler and Munn in a "cool-down" ride where alcohol was

consumed, and Tunink and Munn were allowed to have sexual relations in the back seat while the Chief of Police drove them around the countryside. This behavior, the court concludes, went way beyond the boundaries of what a reasonable jury could find constituted expected conduct from the City's Chief of Police.

On appeal, we approved of the district court's reasoning and affirmed. *Id.* We further added:

Johannsen was engaging in social behavior at the time the accident occurred, not as the city's police chief. This is shown by going home, changing out of his uniform jacket, leaving his duty belt and gun, and switching from his patrol car to his personal vehicle before going to his friends' house. Furthermore, it stretches the boundaries of credulity to believe a police chief, in the course of fulfilling his duties, would drive around beyond the city limits with three friends in his personal vehicle with the type of behavior going on in the back seat. Because the undisputed evidence shows Johannsen was not acting within the scope of his employment at the time of the accident, the district court properly granted summary judgment to the City and dismissed it from the lawsuits.

*Id.*

Following our decision upholding summary judgment for the City, Tunink and Munn's estate agreed to waive a jury trial and submit their case against Johannsen to the court on stipulated facts. The court subsequently entered a \$3,250,364 judgment against Johannsen. Johannsen then assigned to Tunink and Munn's estate any claims he had against the City's insurer, Continental Western Insurance. Tunink and Munn's estate brought this suit against Continental Western alleging that Johannsen had insurance coverage under Continental Western's policies.

Continental Western provides three insurance policies for the City: a commercial general liability policy; an umbrella policy; and a business auto policy. The commercial general liability and umbrella policies provide coverage

for an “insured,” which includes employees “but only for acts within the scope of their employment by [the City] or while performing duties related to the conduct of [the City’s] business.” The business auto policy provides coverage for employees’ personal vehicles “but only while used in [the City’s] business or [the City’s] personal affairs.”

Continental Western moved for summary judgment. It maintained Johannsen was not an “insured” under the policies because at the time of the accident (1) he was not acting within the scope of his employment, (2) he was not performing any duties related to the City’s business, and (3) his personal vehicle was not being used in the City’s business. Tunink and Munn’s estate conceded the first point, i.e., that Johannsen was not acting within his scope of employment, given our holding in the previous case. However, they argued Johannsen was performing duties related to the City’s business because he was “keeping the peace” by taking Tunink on a “cool-down ride.”

Following a hearing, the district court granted summary judgment in favor of Continental Western. The district court found:

Plaintiffs contend that the phrase “related to the conduct of your business” is broader and more expansive than the phrase “scope of employment.” Although they don’t expand upon their argument, it is logical. “Scope of employment” requires an employment relationship and “related to the conduct of your business,” does not. A volunteer may be covered under the latter, but not the former while an employee may be covered under either. The latter phrase would permit coverage for more types of persons by expanding coverage beyond only employees. Johannsen’s activities must be viewed to determine whether they were related to the conduct of the City’s business as a volunteer or in a capacity other than as an employee. The court cannot find under the record that such is the case.

Like the Court of Appeals held in its opinion, it is inconceivable to this court that the City’s business would include

Johannsen driving his friend outside the city limits after 3:00 a.m. in the morning while alcohol was being consumed in his vehicle. Further, that two female passengers in Johannsen's vehicle were in any way related to the conduct of the city's business or that one of those female passengers, Munn, engaging in sexual relations with Tunink, while being driven around the countryside by Johannsen, was in any way, shape or form related to the conduct of the city's business. There is simply no rational connection between these activities and furtherance of the City of Sutherland's business.

While the phrase "scope of employment" is more limiting than either "used in your business" or "related to the conduct of your business," the Plaintiffs have not shown how Johannsen's conduct could reasonably be viewed as being related to the conduct of the city's business.

Tunink appeals.<sup>1</sup>

Upon our review, we approve of the reasons and conclusions in the district court's opinion. Tunink's counsel has done an able job of advocating the theory that Johannsen was performing City-related business by taking Tunink on a cool down ride starting at 3:00 a.m., but the undisputed facts do not support that theory. Johannsen admits that after he spoke to the men in the downtown area between 2:30 and 2:45 a.m., they dispersed, thus eliminating the threat of another confrontation. At that point, Johannsen went home, removed his uniform and duty gear, changed to his personal vehicle, picked up his female friend, and picked up Tunink and Munn. Simply stated, a reasonable jury could not find that Johannsen's conduct after 3:00 a.m. was related to the business of the City, or that his vehicle was being used in the City's business at the time of the accident. Accordingly, we affirm the grant of summary judgment in favor of Continental Western under Iowa Court Rule 21.29(1)(d).

**AFFIRMED.**

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<sup>1</sup> Munn's estate has not appealed.